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15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA**

17 INTEL CORPORATION and APPLE INC.,

18 Plaintiffs,

19 v.

20 FORTRESS INVESTMENT GROUP LLC,  
FORTRESS CREDIT CO. LLC, UNILOC  
21 2017 LLC, UNILOC USA, INC., UNILOC  
LUXEMBOURG S.A.R.L., VLSI  
22 TECHNOLOGY LLC, INVT SPE LLC,  
INVENTERGY GLOBAL, INC., IXI IP, LLC,  
23 and SEVEN NETWORKS, LLC,

24 Defendants.

Case No. 3:19-cv-07651-EMC

**DEFENDANTS' JOINT CONSOLIDATED  
RESPONSE TO BRIEFS OF AMICUS  
CURIAE**

Hon. Edward M. Chen

Date: December 17, 2020  
Time: 1:30 p.m.  
Dept.: Courtroom 5

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## 1 I. INTRODUCTION

2 In accordance with the Court’s order, Dkt. 212, Defendants submit this consolidated  
3 response to the amicus briefs filed by the following parties: (1) ACT | The App Association (the  
4 “App Association”), Dkt. 205-1; (2) Unified Patents, LLC and CableLabs (collectively, “Unified  
5 Patents,”), Dkt. 211-1; and (3) the Fair Standards Alliance (“FSA”), Dkt. 209-1.

6 For the reasons set forth below, none of the amicus briefs provides any basis for denying  
7 Defendants’ Joint Motion to Dismiss and Strike Plaintiffs’ Amended Complaint (“Motion”).  
8 Significant portions of these briefs consist of policy arguments about the supposed infirmities of  
9 the patent system and generalized attacks against PAEs that have nothing to do with whether the  
10 Amended Complaint (“AC”) states a claim under Rule 12(b)(6). And when the amici do address  
11 the proper pleading of an antitrust claim, their arguments are either irrelevant, incorrect, and/or  
12 flatly ignore this Court’s Order granting the motion to dismiss the Complaint (“Order,” Dkt. 190)  
13 as well as the Ninth Circuit’s recent holding in *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d  
14 974 (9th Cir. 2020). In sum, just as before, nothing in the amicus briefs rescues Plaintiffs’ failure  
15 to plead any cognizable antitrust claims.

## 16 II. PLAINTIFFS’ AFFILIATIONS WITH AMICI HIGHLIGHT THAT THE AMICUS 17 BRIEFS SHOULD BE TREATED WITH SKEPTICISM

18 As a threshold matter, the Court should give little weight to the amicus briefs given amici’s  
19 affiliation with Apple and Intel. “The term ‘amicus curiae’ means friend of the court, not friend of  
20 a party.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see*  
21 *also Hartford Fire Ins. Co. v. Expeditors Int’l of Washington, Inc.*, No. 10 Civ. 5643(KBF), 2012  
22 WL 6200958, at \*1, n.1 (S.D.N.Y. Dec. 11, 2012) (declining to consider argument of amici  
23 because of their “close relationship” to one of the parties). Here, Plaintiffs are members of  
24 signatories on each of the three amicus briefs. Both Apple and Intel are members of FSA and the  
25 App Association,<sup>1</sup> and Apple is a member of Unified Patents.<sup>2</sup>

27 <sup>1</sup> See Fair Standards Alliance, *Members*, available at <https://fair-standards.org/members/>;  
28 ACT | The App Association, *Sponsors*, available at <https://actonline.org/about/>.

<sup>2</sup> See Unified Patents Br. at 1:26.

While amici need not be “totally disinterested,” they are not supposed to advance a “highly partisan . . . account of the facts.” *See Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1124 (9th Cir. 1986) (quoting *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n. 3 (1st Cir.1979)). Here, the amici are simply vehicles for Plaintiffs and other big tech companies to advance their policy agendas, and much of their briefs seek to attack and disparage Defendants’ alleged business model. To be sure, amici have every right to advocate for their policy positions, but the place for such advocacy is the public square and the halls of Congress, not in off-point briefs in opposition to a motion to dismiss an antitrust case.

### **III. THE ARGUMENTS MADE BY AMICI ARE IRRELEVANT AND FLAWED**

#### **A. The App Association**

The App Association’s brief is nearly identical to the one that it filed previously. Dkt. 131. It does not address any of the issues raised in Defendants’ Motion, nor does it discuss the necessary elements of an antitrust claim, let alone whether these elements have been adequately pleaded. Indeed, the App Association’s brief does not even discuss aggregation of substitute patents at all.

Instead, the App Association spends a significant portion of its brief extolling the virtues of the standard setting process and endorsing the Federal Trade Commission’s (FTC) alleged view that a breach of a FRAND commitment is a “competition law problem.” App Association Br. at 9:13-21. The App Association, however, just ignores the Ninth Circuit’s decision in *Qualcomm*, which specifically rejected this position. 969 F.3d at 997 (“We therefore decline to hold that Qualcomm’s alleged breach of its SSO commitments to license its SEPs on FRAND terms . . . amounted to anticompetitive conduct”). As the Ninth Circuit explained, and as Defendants discuss in their Motion (Mot. at 38:27-29:12), the proper remedy for such alleged breaches lies in contract and patent law, not antitrust law:

[W]hile antitrust policy has its place as a policy lever to enhance market competition, the rules of contract and patent law are better equipped to handle commercial disputes between the world’s most sophisticated companies about FRAND agreements. Echoing this sentiment, a former FTC Commissioner, Joshua Wright, argues that the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law,

1 and that imposing antitrust remedies in pure contract disputes can have harmful  
2 effects in terms of dampening incentives to participate in standard-setting bodies  
and to commercialize innovation.

3 *Qualcomm*, 969 F.3d at 997 (internal citations and quotation marks omitted). The App  
4 Association not only ignores *Qualcomm*, it relies on inapposite authority that directly contradicts  
5 *Qualcomm*'s binding holding. App. Association Br. at 9, n.20.

6 The rest of the App Association's brief is just an attack on the United States patent system.  
7 According to the App Association, so-called "abusers of the patent system" are able to prey on  
8 "small companies," who "often do not have the resources or time to engage in lengthy and  
9 expensive litigation [,] . . . banking on a quick settlement with little or no protest." App  
10 Association Br. at 4:9-16. But even assuming that this policy-based concern has any merit, it has  
11 nothing to do with the numerous pleading deficiencies Defendants demonstrate in their Motion  
12 (e.g., Plaintiffs' failure to plead a viable market, a cognizable antitrust injury, or a Sherman Act or  
13 Clayton Act violation). See *Ward v. Wells Fargo Home Mortg.*, No. 14-CV-00887-JCS, 2014 WL  
14 1922082, at \*9 (N.D. Cal. May 6, 2014) ("[P]olicy arguments are inapposite to the Court's task at  
15 hand, which is to determine whether the claims made in the Complaint are legally sufficient to  
16 survive the standard set forth in Rule 12(b)(6) of the Federal Rules of Civil Procedure."). Neither  
17 "small" nor "big" companies benefit from flawed federal court pleadings or from the improper  
18 application of this nation's antitrust laws.

19 Moreover, the App Association's policy concerns have no application here in any event.  
20 This case is not about "small companies." Apple and Intel are two of the largest and most  
21 powerful corporations in the world, and Apple and Intel do not allege in the AC and no amicus  
22 alleges in its brief, that Defendants have ever brought abusive infringement claims against any  
23 small companies. Nor is this case about trying to extract "quick settlement[s]" (which would be a  
24 dubious strategy against Intel and Apple given their extensive resources). According to Plaintiffs'  
25 AC, the underlying patent suits have involved protracted litigation with billions of dollars at stake.  
26 See, e.g., AC ¶¶ 96, 104, 177. Notably, the App Association does not name a single "small  
27 company" out of its 5,000 members that has supposedly been "abused" by any of the Defendants.  
28 Thus, whatever the merits of the App Association's arguments about supposed abusive patent

1 assertions against small companies, they are simply irrelevant here.

## 2 **B. Unified Patents**

3 Unified Patents spends the entirety of its brief arguing that the AC has pleaded sufficient  
4 facts to demonstrate that Defendants' patents are "weak." But as Defendants' Motion pointed out,  
5 and Plaintiffs' Opposition does not dispute, the AC makes no allegations whatsoever regarding the  
6 vast majority of the infringement suits that Defendants have brought against Plaintiffs. Mot. at  
7 7:8-12. Moreover, Unified Patents (like Plaintiffs) does not dispute that Defendants have obtained  
8 numerous favorable rulings in these infringement suits. Mot. at 7:12-16; *see also id.* at n.6 (listing  
9 favorable rulings).

10 Unified Patents asserts that Defendants' patents must be weak and part of a nefarious  
11 antitrust conspiracy because otherwise the PAE defendants would have taken advantage of the  
12 supposedly "robust market [] for patent litigation financing" rather than accepting allegedly  
13 "severe" terms from Fortress. Unified Patents Br. at 5:18, 5:21-22.

14 This is pure speculation. A conspiracy allegation must be accompanied by "evidentiary  
15 facts." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Unified Patents points  
16 to no evidentiary facts in the AC that there is a "robust market" for patent litigation financing, nor  
17 is an amicus entitled to amend the factual allegations of the AC, which makes no mention of any  
18 such market. 4 Am. Jur. 2d Amicus Curiae § 8 ("[T]he brief of an amicus curiae, or attachments  
19 thereto, cannot be used as a vehicle . . . to raise new facts."); *see also NGV Gaming, Ltd. v.*  
20 *Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) ("[A]n amicus curiae  
21 is not a party and has no control over the litigation and no right to . . . file any pleadings.").

22 The same holds true for Unified Patents' assertion that the litigation finance market "[did]  
23 not want" the "PAE" Defendants' patents solely because the PAE Defendants never took  
24 advantage of such financing. Unified Patents Br. at 5:22. That allegation is nowhere in the AC,  
25 and to "infer" it is simply to speculate. For example, it is equally possible that litigation financiers  
26 made various offers to the "PAE" Defendants, but these offers were declined in favor of Fortress's  
27 offer. Likewise, the AC's allegation that Fortress imposes "severe" terms is both unsupported by  
28 any allegations of evidentiary facts (or citation to or quotation of any term) and flatly contradicted

1 by other paragraphs of the AC which describes these same terms as “favorable.” Mot at 33:1-7  
 2 (citing AC ¶ 50). Unified Patents simply ignores this, and its attempt to pile speculation on top of  
 3 speculation cannot save the AC. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual  
 4 allegations must be enough to raise a right to relief above the speculative level”); *Ashcroft v. Iqbal*,  
 5 556 U.S. 662 (2009) (“facial plausibility” requires “factual content” that permits “reasonable  
 6 inferences” of liability); *Kendall*, 518 F.3d at 1047 (antitrust conspiracy claims require  
 7 “evidentiary facts”).

8       Regardless, Unified Patents’ discussion of allegedly “weak” patents is ultimately a side  
 9 show. As this Court made clear in its Order, the key antitrust question is not whether Defendants  
 10 have aggregated “weak” patents, but whether they have aggregated so many substitute patents on a  
 11 specific technology that an alleged infringer is essentially deprived of substitutes. *See, e.g.*, Order  
 12 at 15-16 & n.6, 39:14-17. As Defendants’ Motion demonstrated, Plaintiffs have failed to allege  
 13 that this is the case. Unified Patents’ brief, however, hardly mentions “substitute” patents.  
 14 Instead, it asserts that Defendants have been able to acquire a “near-infinite supply of patents” that  
 15 supposedly enable them to bring serial “nuisance suits.” Unified Patents Br. at 6:2-4, 7:22-26.  
 16 But this has nothing to do with whether the patents are “substitutes,” nor is this case about  
 17 “nuisance” suits as explained above. Accordingly, Unified Patents’ arguments are not only  
 18 baseless, they are irrelevant.

### 19       **C. Fair Standards Alliance**

20       FSA’s brief focuses on the standard-setting process and Defendants’ supposed refusal to  
 21 license standard essential patents (“SEPs”) on FRAND terms. FSA Br. at 2-5. It argues that  
 22 “[p]rivate standard setting and the antitrust laws lie at the heart of this case.” FSA Br. at 2:13.  
 23 Actually, “private standard setting” is relevant only to Apple’s UCL claim (Count 4).

24       In any event, while nearly the entirety of FSA’s brief is dedicated to arguing that it is  
 25 “anticompetitive” not to license SEPs on FRAND terms, FSA barely even acknowledges, much  
 26 less attempts to distinguish, on-point Ninth Circuit authority holding that an alleged breach of a  
 27 FRAND obligation does not sound in antitrust law. *See Qualcomm*, 969 F.3d at 1005 (“To the  
 28 extent Qualcomm has breached any of its FRAND commitments . . . the remedy for such a breach



lies in contract and patent law.”).<sup>3</sup> FSA also contorts this Court’s Order, arguing that “plaintiffs may ‘simply allege that Defendants *claim* to own SEPs instead of alleging that Defendants own or control patents that actually are SEPs.’” FSA Br. at 14:18-23 (quoting this Court’s Order, at 18 n.3) (emphasis in original). FSA omitted the words “it is also questionable whether Apple can” that directly preceded FSA’s quotation of this Court, Order at 18 n.13, and also omitted this Court’s recognition—in the same footnote as the quotation—that “there is a fair argument that such conduct constitutes a breach of contract.” *Id.* This Court’s prior recognition of what is a fair argument is now the law of this Circuit, which FSA simply ignores.<sup>4</sup> And a party’s mere “claim” or “declaration” that it has an SEP cannot constitute harm to competition unless, among other things, the party does in fact own an SEP. While such declarations might bear on whether that party breached a contractual commitment to license “declared” or “claimed” SEPs on FRAND terms—that same “claim” or “declaration” does not create any anticompetitive “lock-in” effect. *See, e.g.*, AC ¶ 395. Only an actual SEP (not a “claimed” or “declared” SEP) could possibly “lock in” a standard by excluding other available substitutes.

The remainder of FSA’s brief improperly duplicates arguments that were made in Plaintiffs’ Opposition. Consequently, in addition to being flawed for all of the reasons noted in Defendants’ concurrently-filed reply, FSA’s brief is also an improper “attempt to have the Court consider extra briefing beyond the limits allowed by this Court’s Local Rules.” *Sulitzer, et al. v. Tippins, et al.*, Case No. 2:19-cv-08902-GW-(MAAx) (C.D. Cal. March 19, 2020), Dkt. 36. To make matters worse, FSA’s brief is largely dedicated to re-arguing the sufficiency of allegations that this Court already rejected as insufficient as a matter of law. For example, FSA claims that the AC adequately pleads “direct evidence,” but then cites the very same paragraphs offered in the

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<sup>3</sup> Like Plaintiffs’ Opposition, FSA’s brief never points to any allegation of fact in the AC that identifies what, supposedly, is non-FRAND about any royalty in any license agreement between Defendants and anyone referenced in the AC.

<sup>4</sup> It is hard to see how FSA could have overlooked the holding in *Qualcomm* given that FSA was an amicus in that case as well, and the Ninth Circuit rejected FSA’s position. *See* Brief of Amicus Curiae Fair Standards Alliance In Support Of The Federal Trade Commission And In Support Of Affirmance, *FTC v. Qualcomm*, 19-16122 (9th Cir. Nov. 29, 2019), Dkt.175 at 3 (arguing that “violations of the FRAND commitment . . . can, in addition to creating liability for breach of contract, also function to impede competition in violation of the antitrust laws.”).

prior Complaint that the Court rejected as inadequate and “largely conclusory in nature.” Order at 15:21; *Compare* FSA Br. at 8 (citing AC ¶¶ 49-50) *with* Cmplt. ¶¶ 49-50. Similarly, FSA argues that the AC adequately alleges antitrust injury to Plaintiffs, FSA Br. at 14:6-13, yet it cites the same allegations in the Complaint that the Court already rejected as failing to state a claim. *Compare id.* (citing AC ¶¶ 96, 104, 437) *with* Dkt. 142-1 at 13:18-25 (citing Cmplt. ¶¶ 95, 102, 170). Finally, FSA argues in favor of the purported propriety of Plaintiffs’ “market” allegations, but does so solely with FSA’s ipse dixit and, if FSA had its way, this case would be proceeding under the “Electronics Patents Market” this Court rejected as insufficient as a matter of law. Dkt. 142-1 at 6:6-20 (claiming the Electronics Patents Market was a properly pleaded “cluster of products,” which Plaintiffs did not even contend).

Indeed, the only thing of consequence that FSA’s brief provides is the recognition that, even under a “direct evidence” theory, Plaintiffs’ market analysis must “show that the defendant commands a substantial share of the market.” FSA Br. at 6:21-22 (quoting Order at 13) (emphasis added). The AC makes no such showing, and Plaintiffs’ Opposition does not argue to the contrary (nor, for that matter, does FSA). Consequently, FSA’s “support” for denial of Defendants’ Motion to Dismiss actually illustrates why the Motion must be granted.

#### IV. CONCLUSION

The arguments and assertions raised by amici are irrelevant, incorrect, and/or inconsistent with Ninth Circuit authority and this Court’s Order. For all of the reasons stated in Defendants’ Motion and Reply, the AC should be dismissed. Nothing in the amicus briefs demonstrates otherwise.

Dated: November 17, 2020

Respectfully submitted,

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**ECF ATTESTATION**

I, Olivia Lauren Weber, am the ECF user whose ID and password are being used to file DEFENDANTS' JOINT CONSOLIDATED RESPONSE TO BRIEFS OF AMICUS CURIAE. I hereby attest that I received authorization to insert the signatures indicated by a conformed signature (/s/) within this e-filed document.

By: /s/ Olivia Lauren Weber  
Olivia Lauren Weber